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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DONAVIN EUGENE WORTHINGTON,

Defendant and Appellant.

E071739

(Super.Ct.No. RIF1703814)

OPINION

APPEAL from the Superior Court of Riverside County. Emma C. Smith, Judge.

Affirmed with directions.

Bruce L. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Donavin Eugene Worthington, pled guilty to the court to possession of a firearm by a prohibited person (count 1; Pen. Code, § 29800, subd.

(a)(1)), unlawful carrying of a concealed weapon (count 2; Pen. Code, § 25400, subd.

(a)), possession of ammunition by a prohibited person (count 3; Pen. Code, § 30305, subd. (a)), possession of brass knuckles (count 4; Pen. Code, § 21810), possession of methamphetamine (count 5; Health & Saf. Code, § 11377, subd. (a)), resisting arrest (count 6; Pen. Code, § 148, subd. (a)(1)), shoplifting (count 7; Pen. Code, § 459.5), and driving without a valid driver's license (count 8, Veh. Code, § 14601.1, subd. (a)). Defendant additionally admitted he had suffered from six prior prison terms (Pen. Code, § 667.5, subd. (b)) and one prior strike conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). As indicated, the court sentenced defendant to a five-year, aggregate term of imprisonment.

After an attorney from Appellate Defenders, Inc. filed a notice of appeal, this court appointed counsel to represent defendant. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the facts, a statement of the case, and identifying one potentially arguable issue: whether the trial court abused its discretion by not striking the prior strike conviction enhancement. We affirm with directions.

I. FACTUAL AND PROCEDURAL BACKGROUND¹

On September 19, 2017, the loss prevention officer for a Kmart store flagged down an officer patrolling the Kmart parking lot. The individual pointed to a vehicle and informed the officer that the occupants were involved in a theft. As the vehicle began to

¹ Defendant stipulated the preliminary hearing transcript would provide the factual basis for his plea. We take our factual recitation from the preliminary hearing transcript.

back up, the officer drove his vehicle behind the car, activated his overhead lights, and conducted a stop of the vehicle.

The officer contacted the female occupant, who identified the driver as defendant, her cousin. Defendant said he was on parole. The officer conducted a search of defendant during which he removed a set of brass knuckles from defendant's pocket.

The officer spoke with the loss prevention officer at the Kmart store who said he observed the female place merchandise into a basket and begin to exit the store together with defendant. The loss prevention officer approached them and told them to stop; the female said, "Fuck you." The two exited the store and entered the vehicle.

On September 28, 2017, an officer conducted a traffic stop of a vehicle driven by defendant, whom he recognized as someone he had stopped on prior occasions. Defendant appeared nervous and refused to place his hands upon the steering wheel as the officer commanded. Defendant unsuccessfully attempted to start the car.

The officer opened the car door and attempted to handcuff defendant. Defendant attempted to prohibit the officer from handcuffing him. After handcuffing defendant and placing him in the officer's patrol car, the officer located a loaded pistol on the driver's seat of defendant's car; the pistol had been stolen during a residential burglary in July 2017.

Defendant had shaved keys in one of his pockets which the officer testified are commonly used to steal vehicles. In defendant's other pocket the officer found a pipe with white crystal residue. The officer also found a small baggie containing 4.7 grams, a

usable amount, of a white substance which field tested positive for methamphetamine.

The officer further found a box in the car containing additional ammunition.²

On the date defendant entered his plea, the court noted: “It does appear that you’re going to accept what it was that I indicated. [¶] I was not willing to strike your strike prior for a number of reasons. However, I do think that the five-year sentence is appropriate give the facts in this case, as well as your criminal history.” Defendant then entered the plea as described above in addition to admitting a violation of probation and receiving a “terminal disposition” on an additional misdemeanor case. The court sentenced defendant to the aggregate, indicated sentence of five years’ imprisonment consisting of the following: two years doubled pursuant to the strike prior on count 1; eight months doubled on the remaining felony counts, on which the court stayed punishment; 180 days on each of the misdemeanor counts concurrent; a consecutive, one-year term on one of the prior prison terms; and a stay of punishment on the additional prior prison terms.³

² The People failed to adduce evidence of, and defendant did not stipulate to, any factual basis concerning the three misdemeanors, counts 6 through 8. “However, a plea of guilty . . . waives an appellate claim of the nature ‘there is insufficient evidence supporting [the] plea.’” (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1365.) “[A] plea of guilty . . . forecloses an appellate challenge that the plea lacks a factual basis. [Penal Code] [s]ection 1192.5 requires a factual inquiry by the trial court, not by the appellate court. Particularly where a defendant not only personally pleads . . . but also personally or through counsel concedes the existence of a factual basis for his or her pleas” (*Id.* at p. 1366.) A defendant is estopped from arguing on appeal what he has already conceded below, that there is a factual basis for his plea. (*Id.* at p. 1359.)

II. DISCUSSION

We offered defendant an opportunity to file a personal supplemental brief, which he has not done. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The judgment is affirmed. The trial court is directed to strike the four prior prison term enhancements on which it stayed punishment. The trial court is further directed to deliver a certified copy of a revised abstract of judgment to the Department of Corrections and Rehabilitation.

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McKINSTER
_____ J.

We concur:

RAMIREZ
_____ P. J.

FIELDS
_____ J.

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³ When prior prison terms are proven, “the court must either impose the prior prison enhancements or strike them. [Citation.]” (*People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) We shall direct the trial court to strike the four prior prison terms.